Toffoloni v. LFP Publishing Group, LLC

Doc. 73 Att. 9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,	)	
as Administrator and Personal	)	
Representative of the ESTATE	)	
OF NANCY E. BENOIT,	)	
	)	CASE NO. 1:08-cv-00421-TWT
Plaintiff,	)	
	)	
vs.	)	
	)	
LFP PUBLISHING GROUP, LLC,	)	
d/b/a Hustler Magazine, et al,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER

EXHIBIT H

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

RESPONSE AND OBJECTIONS OF DEFENDANT LFP PUBLISHING GROUP, LLC TO PLAINTIFF'S NOTICE OF RULE 30(B)(6) DEPOSITION

Defendant LFP Publishing Group, LLC ("LFP") hereby respectfully responds to Plaintiff's Notice of Rule 30(b)(6) deposition to LFP (the "Notice") which was served by U.S. Mail on December 21, 2009.

Time and Place of Deposition:

LFP objects to Plaintiff's request to take the depositions of LFP corporate representatives in Atlanta. "[I]t is 'well-settled' that '[t]he deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business,' especially when . . . the corporation is the defendant." *Payton v. Sears, Roebuck and Co.*, 148 F.R.D. 667, 669 (N.D. Ga. 1993) (Carnes, J.) (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)). Where, as here, a corporate defendant which is sought to be deposed in a forum away from its principal place of business "files a timely objection the objection should be sustained absent some unusual circumstance to justify putting the defendant to such inconvenience." *Grey v. Continental Marketing Assocs.*, 315 F.Supp. 826 (N.D. Ga. 1970) (Edenfield, J.).

LFP maintains its principal place of business in Beverly Hills, California. LFP's corporate officers and agents with knowledge of the topics set forth in the Notice also reside in California. LFP does not maintain an office in Georgia, nor do any of its officers or employees, including the witnesses with knowledge of the topics set forth in the Notice, reside or maintain an office in Georgia. Requiring LFP officers and/or agents that do not reside or conduct business in Atlanta to appear in Atlanta for deposition would be unjustifiably costly and burdensome to LFP. *Thompson v. Sun Oil Co.*, 523 F.2d 647 (8th Cir. 1975) (company representatives could not be compelled to travel to forum from out of state because company would have incurred considerable expense to transport persons sought to be deposed). Bruce David, one of LFP's corporate agents with substantial knowledge of the matters at issue in this lawsuit, and whom LFP hereby designates to testify as its corporate representative with regard to a number of topics in the Notice, as set forth below, does not travel by air and could not reasonably appear for deposition on behalf of LFP in Atlanta without causing the witness and LFP to incur the significant annoyance, undue burden, expense, and lost productivity required to travel across the country, and back again, by rail.

Plaintiff is not a Georgia resident; nevertheless she selected Georgia as the forum for her suit, and elected to "roll the dice" and proceed with the risk of incurring substantial discovery expense despite LFP's request to stay these proceedings while its petition for certiorari to the U.S. Supreme Court is pending. (*See* Oct. 2, 2009 Transcript of Motions Hearing, D.I. 68 at 6.) Here, there is no "compelling reason to depart from the general rule requiring that a corporate defendant's agent be deposed at the corporation's principal place of business." *Payton*, 148 F.R.D. at 669.

LFP also objects to the Notice to the extent it attempts to impose an obligation on LFP to provide corporate representatives at a deposition continuing "from day to day until completion." The deposition is confined to one-day and seven-hours by Fed. R. Civ. P. 30(d)(1).

Designation of Representatives of LFP to Testify, and Objections:

(1)

Each and every instance, including, but not limited to, magazines videos, DVDs, internet sites, content, movies, or any other medium in which the Defendant, or any parent company, partner, agent, affiliate, or licensee of any Defendant published, broadcast, displayed, or otherwise disseminated or made available to the public nude and/or partially nude images (hereinafter the "images") of Nancy Elizabeth Benoit (hereinafter "Ms. Benoit").

LFP Response:

LFP designates Donna Hahner to testify on its behalf.

(2)

All money, revenue, fees, income or other things of value received by Defendant, as the result of sales or licenses of any media containing images of Ms. Benoit.

LFP Response:

LFP designates Donna Hahner to testify on its behalf.

(3)

The net worth of Defendant LFP Publishing Group, LLC for the years ending 2006, 2007, 2008, and 2009.

LFP Response:

LFP objects to this topic as seeking information irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of LFP do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation.

Plaintiff's suggestion that the requested information is relevant to her claim for punitive damages is contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue. Further, Plaintiff has not alleged nor could she allege in good faith that there was a "deliberate continuation of the appropriation" where LFP stopped publication of the images of Ms. Benoit once it learned of Plaintiff's claim.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP will not designate a representative to testify regarding this topic.

(4)

The net worth of L.F.P., Inc. for the years ending 2006, 2007, 2008, and 2009.

LFP Response:

LFP objects to this topic as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of non-party L.F.P., Inc. do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation. Further, LFP is a separate and distinct legal entity from L.F.P., Inc., and is not in legal possession or control of that entity's information.

Even if there were any basis for Plaintiff to seek discovery from non-party L.F.P., Inc., which there is not, Plaintiff's claim that the requested information is relevant to her claim for punitive damages is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP, much less L.F.P., Inc., in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue. Further, Plaintiff has not alleged nor could she allege in good faith that there was a "deliberate continuation of the appropriation" where LFP stopped publication of the images of Ms. Benoit once it learned of Plaintiff's claim.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even Defendant LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP will not designate a representative to testify regarding this topic.

(5)

Each and every instance in which Defendants' agents, employees, partners, or licensees discussed or communicated in any way about the subject of the Defendants' plans to publish or disseminate, and the publishing of the images of Ms. Benoit. This topic includes all internal and external emails, memoranda, facsimiles, and notes of oral discussions by, among, and between Defendants' agents, employees, partners, or licensees, wherever located, concerning the subject of Defendants' acquisition of, payment for, publication, licensing and/or revenues from and potential liability for the dissemination of nude and partially nude images of Ms. Benoit.

LFP Response:

LFP designates Bruce David to testify on its behalf, and objects insofar as the topic contains privileged attorney-client communications.

(6)

The amount of money or other things of value Defendant LFP Publishing Group, LLC or any related person or entity paid Mark Samansky for nude and/or partially nude images of Ms. Benoit.

LFP Response:

LFP designates Bruce David to testify on its behalf.

(7)

Each and every instance in 2006, 2007, 2008 and 2009, when the Defendant LFP Publishing Group, LLC or any affiliated company, paid a model, celebrity, actor or other performer or private individual for the use of nude images of any such persons, and the amount paid to each such person.

LFP Response:

LFP designates Bruce David to testify on its behalf.

(8)

Profit and loss and/or operating statements for LFP Publishing Group, LLC for each month in calendar years 2006, 2007, 2008, and 2009.

LFP Response:

LFP objects to this topic as seeking information irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of LFP do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation.

Plaintiff's suggestion that the requested information is relevant to her claim for punitive damages is contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue. Further, Plaintiff has not alleged nor could she allege in good faith that there was a "deliberate continuation of the appropriation" where LFP stopped publication of the images of Ms. Benoit once it learned of Plaintiff's claim.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP will not designate a representative to testify regarding this topic.

(9)

Profit and loss and/or operating statements for L.F.P., Inc. for each month in calendar years 2006, 2007, 2008, and 2009.

LFP Response:

LFP objects to this topic as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of non-party L.F.P., Inc. do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation. Further, LFP is a separate and distinct legal entity from L.F.P., Inc., and is not in legal possession or control of that entity's information.

Even if there were any basis for Plaintiff to seek discovery from non-party L.F.P., Inc., which there is not, Plaintiff's claim that the requested information is relevant to her claim for punitive damages is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP, much less L.F.P., Inc., in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue. Further, Plaintiff has not alleged nor could she allege in good faith that there was a "deliberate continuation of the appropriation" where LFP stopped publication of the images of Ms. Benoit once it learned of Plaintiff's claim.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even Defendant LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

LFP will not designate a representative to testify regarding this topic.

(10)

A statement of net worth or financial statement for LFP Publishing Group, LLC d/b/a "Hustler Magazine" for the years 2006, 2007, 2008, and 2009.

LFP Response:

LFP objects to this topic as seeking information irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of LFP do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation.

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LFP will not designate a representative to testify regarding this topic.

(11)

A statement of net worth or financial statement for L.F.P., Inc. for the years 2006, 2007, 2008, and 2009.

LFP Response:

LFP objects to this topic as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of non-party L.F.P., Inc. do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation. Further, LFP is a separate and distinct legal entity from L.F.P., Inc., and is not in legal possession or control of that entity's information.

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LFP will not designate a representative to testify regarding this topic.

(12)

The financial and/or other compensation paid by Defendant LFP Publishing Group, LLC or any related or affiliated company for the 50 highest paid models, celebrities or private individuals for posing for nude images of said person, published in each edition of Hustler Magazine for 2006, 2007, 2008, and 2009.

LFP Response:

LFP designates Bruce David to testify on its behalf.

(13)

The reasons for the difference between the Canada and American covers of Hustler Magazine, including the timing, strategy, etc. for the differences.

LFP Response:

LFP designates Donna Hahner to testify on its behalf.

Respectfully submitted January 4, 2010.

James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537
Darrell J. Solomon
Georgia Bar No. 305922

McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

Pro hac vice:

Paul J. Cambria, Jr.
Jeffrey Reina
William M. Feigenbaum

LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924
(716) 849-1333
(716) 849-1315 (facsimile)

Attorneys for LFP Publishing Group, LLC

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **Responses and Objections to Plaintiff's Notice of Rule 30(b)(6) Deposition** upon Plaintiff's attorney of record via e-mail and Federal Express to:

Richard Decker, Esq.
(RDecker@hallmanwingate.com)
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

This 4th day of January 2010.

S. Derek Bauer

Attorney for Defendant
LFP PUBLISHING GROUP, LLC